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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. _____.

UNITED STATES OF AMERICA,

Appellant,

vs.

MILAN VUITCH,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

BRIEF AND APPENDICES OF DR. BART HEFFERNAN, AMICUS CURIAE IN SUPPORT OF APPELLANT.

INTEREST OF THE AMICUS CURIAE.

There is presently pending in the U. S. District Court for the Northern District of Illinois an action under the Declaratory Judgment Statute (28 USC 2281) seeking to have the Illinois statute on abortion declared unconstitutional.

Dr. Bart Heffernan has been appointed Guardian Ad Litem for the class of all unborn children in the State of Illinois who will be adversely affected by the abolition of the abortion statute in Illinois. His Petition to Intervene is

attached as Appendix A; the Order allowing intervention and appointing Dr. Heffernan Guardian Ad Litem for the class of all unborn children in the State of Illinois is attached as Appendix B.

It is the obligation of the Guardian Ad Litem to take all necessary action to secure the legal rights and redress the legal wrongs to his wards. The outcome of the instant case will profoundly affect his wards. The Federal Rules of Civil Procedure state: "The Court shall appoint a Guardian Ad Litem for an infant or incompetent person not otherwise represented in an action or it shall make such other order as it deems proper for the protection of the infant or incompetent person." (F. R. C. P., Rule 17(c)). Dr. Heffernan has received consent from all of the parties to file an Amicus Brief.

STATUTE INVOLVED.

D. C. Code Ann. § 22-201:

> "Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces, or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years; or if the death of the mother results therefrom, the person procuring or producing, or attempting to procure or produce the abortion or miscarriage shall be guilty of second degree murder. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 809; June 29, 1953, 67 Stat. 93, ch. 159, § 203.)"

SUMMARY OF ARGUMENT.

Congress has as much power to prohibit or regulate abortion in the District of Columbia as do the state legislatures for their respective states. By D. C. Code 22-201, adopted in 1901 and readopted in 1953, Congress prohibited all abortions except those "done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine." The provision requiring a licensed practitioner was for the protection of the mother against incompetent medical treatment. The provision "necessary for the preservation of the mother's life or health" was the balance struck by Congress between the interests of the mother in life or health, and that of the child in his continuing life.

By reason of inclusion of "health," the balance struck by Congress was more liberal toward the mother than that by the state legislatures. But Congress, like the legislatures, did prescribe a standard or scale of measurement of the relative rights of mother and child: life or health of the former against life of the latter. It thereby forbad indiscriminate or permissive destruction of the unborn, which is authorized under the decision below.

That decision distorts the law from one forbidding abortions except as narrowly limited, into one authorizing all abortions if they be done by physicians.

The minimal protection of the unborn, provided by Congress, is clearly within the competence of government. For centuries, the common law of property has treated the unborn child as an autonomous human being. Within the last several decades, the burgeoning scientific knowledge of the realities of fetal life, has worked a dramatic revolution in tort law: "The unborn child in the path of an

automobile is as much a person in the street as the mother." It has even been held that sacred constitutional rights of parents, *e.g.* free exercise of religion, must give way to the unborn's need for a blood transfusion. In other contexts, interests of the parents must be subordinated when they conflict with the unborn's interest in his continuing life. The state must withhold its penal sanction of execution while a woman carries a child.

This convergent development of property, tort, equity and constitutional principles has been the law's response to the scientific realities of life within the womb. As scientific certainty has increased, the law's protection has become more comprehensive, notably in the tort cases. Until the almost hysterical current clamor for completely permissive abortion, the law's progress had been constant, and roughly parallel to the increase in scientific certainty of the nature of the unborn. It would be a strange twist of values if government, which acknowledges all of these rights in the unborn, were held wholly helpless to protect them against direct destruction at the mere will of the mother.

The Solicitor General is demonstrating in his Brief that the concept used below thus to emasculate government—vagueness—cannot stand the test of this Court's teaching. On this point, we limit ourselves to arguing that the *Belous* case relied on below is insupportable.

The argument that any restriction on abortion invades marital privacy is fatuous. Of course a woman has the right to avoid the burden of pregnancy. But after pregnancy exists, the evolution of the law regarding women's rights encounters the evolution in scientific knowledge, that the unborn is a human person.

Human life is a continuum—all of it, fetal, infant, adolescent, mature or aged, is in the process of becoming. The

biological realities of fetal life, made apparent to all willing to read, by modern embryology, fetology, genetics and perinatology, are elucidated in some detail in the final pages of this Brief. They are summarized by H. M. I. Liley, M.D. in *Modern Motherhood,* pp. 26-27 (Rev. Ed. Random House, 1969):

> "The head (of the fetus), housing the miraculous brain, is quite large in proportion to the remainder of the body, and the limbs are still relatively small. Within his watery world, however (where we have been able to observe him in his natural state through a sort of closed-circuit x-ray television set), he is quite beautiful, perfect in his fashion, active and graceful. He is neither a quiescent vegetable nor a witless tadpole, as some have conceived him to be in the past, but rather a tiny human being, as independent as though he were lying in a crib with a blanket wrapped around him instead of his mother."

ARGUMENT.

I.

CONGRESS INTENDED TO PROTECT THE UNBORN CHILD AS WELL AS THE MOTHER.

A. The Authority of Congress.

Section 8 of Article I of the United States Constitution gives Congress power: "To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the Government in the United States . . ."

Dr. Vuitch challenged the exercise of that authority in the trial court which, in its opinion, referred to Congress' police power in passing the District of Columbia abortion statute. It is clear that Congress exercises over the District of Columbia at least all the legislative powers which a state may exercise over its affairs. *Berman* v. *Parker*, 348 U. S. 26, 31 (1954). See also *District of Columbia* v. *John R. Thompson Co.*, 346 U. S. 100, 108. In *Stoutenburgh* v. *Henrick*, 129 U. S. 141, 147, 9 S. Ct. 256, 257, 32 L. Ed. 637, it is said at page 638:

> "Congress has express power 'to exercise exclusive legislation in all cases whatsoever' over the District of Columbia thus possessing the combined powers of a general and of a state government in all cases where legislation is possible."

B. The Exercise by Congress of Its Authority Is Liberal to the Mother Compared to That of the Several States.

When passed in 1901, the District of Columbia statute on abortion (now D. C. Code Sec. 22-201) was substantially similar to most abortion statutes in the several states and territories, with the exception of the words ". . . or health . . ." which then appeared *only* in the D. C. statute. *All* of the abortion statutes of the states and territories in 1901 absolutely prohibited or severely restricted abortion. Several absolutely prohibited it. Most prohibited it unless necessary to preserve (or save) the life of the mother, although there was occasional variation in the verbal formula. For example, Maryland proscribed abortion unless ". . . no other method will secure the safety of the mother." New Jersey prohibited abortions done "without lawful justification." Pennsylvania proscribed abortions done with the "unlawful" use of any instrument. In a few states, a necessity to save the child's life was an additional authorizing exception. See Quay, *Justifiable Abortion*, 49 Georgetown Law Journal, 395, 447-520 (1961).

When Congress passed the Law Enforcement Act of 1953 amending Section 22-201 of the D. C. Code to its present form, it made no substantive change in the prohibition of abortions. The law continued to prohibit them except "as necessary for the preservation of the mother's life or health" and when performed by a competent licensed practitioner of medicine. In 1953, almost all state statutes still prohibited abortions unless necessary for the preservation (or to save) the life of the mother. Apparently by this time only the District of Columbia and Alabama statutes contained the words "or health" as well as "life" in granting the exceptional protection to the mother. See Quay *Justifiable Abortion, supra,* at pp. 447, 456.

By prohibiting abortions except when necessary to pre-

serve the life of the mother, Congress did only what almost all American legislatures had done. True, by adding the words ". . . or health . . ." Congress struck a balance, as between mother and unborn child, more favorable to the mother than that of the other American legislatures.

The significant thing is that in 1901 Congress prohibited all abortions except when performed by physicians and "when necessary for the preservation of the mother's life or health." This protection of the unborn* was reconfirmed as recently as 1953. The decision below reverses the Congressional mandate, and makes permissible all abortions, without reference to any balance of interest between mother and child, provided only the abortion is performed by a physician. Obviously, Congressional intent has not so reversed itself, and the court's technique chosen to work the reversal is that the statutory words are unconstitutionally vague. To have stricken as vague only ". . . or health . . ." would have made the District of Columbia law conform with the American norm, which prohibits abortions except when necessary to save the mother's life. But the Court below reached out to strike down the entire clause without analysis, invoking only *People* v. *Belous*, 71 Cal. 2d 996, 458 P. 2d 194, 80 Cal. Rptr. 354 (1969), the four to three California decision demonstrably lacking in historical accuracy. See Comment, *To Be or Not To Be: The Constitutional Question of the California Abortion Law*, 118 U. Pa. L. Rev. 643 (1970).**

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* Where the statute involved, as in the District of Columbia, makes no distinction between the quick and the unquickened fetus it is clear that the life revered under the statute is the fetus itself. See Means, *The Law of New York Concerning Abortion*, 14 New York L. Forum 411, 508 (1968). Means says: "The Common Law protected the quickened (but not the unquickened) fetus as a being with its own right to life, immune to destruction at maternal will." *Ibid.* p. 508.

** The rationale of *Belous*, however imprecise historically, as a practical matter worked no serious judicial undermining of legislation because while that case was pending, the California legislature amended its abortion statute.

We later show that the exception "when necessary for the preservation of the mother's life or health" is the working norm of the American medical profession, understood and daily applied as a standard medical judgment. This leaves nothing—other than loose references below to rights of privacy and Fifth Amendment procedural safeguards—upon which to predicate the court's reversal of the legislative protection of the unborn.

C. Congress and the Several States Created a Standard of Due Process and Equal Protection for the Unborn Child.

As noted, Congress has forbidden abortions except those necessary to preserve the life or health of the mother, when performed by licensed physicians. The requirement of a licensed physician was to safeguard the mother. Prohibition of *all* abortions, except those necessary to safeguard the life or health of the mother, was the standard to protect the rights of the unborn.* It was the balance struck in measuring life against life—not a mere additional protection of the mother. *In effect, Congress enacted a minimal norm of due process and equal protection for the unborn by specifically forbidding killing them unless neces-*

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*Many courts have held that the purpose of the abortion statutes are for the protection of both mother and child. *State* v. *Howard*, 32 Vt. 380 (1859); *State* v. *Hoover*, 252 N. C. 133, 113 S. E. 2d 281 (1960); "The statute defining abortion is designed to protect the life of the mother as well as the child", *Anderson* v. *Commonwealth*, 190 Va. 665, 58 S. E. 2d 72, 75 (1950); *State* v. *Siciliano*, 21 N. J. S. 249, 121 A. 2d 480, 495 (1956); *State* v. *Murphy*, 27 N. J. L. 112, 114 (Sup. Ct. 1858), *Mills* v. *Commonwealth*, 13 Pa. St. 630 (1850). Even where the statute involved says nothing concerning the pregnant woman's participation in the abortion other than as a seemingly consenting passive participant, some courts have held her guilty as an accessory to the crime. *State* v. *McCoy*, 52 OS 157, 39 N. E. 316 (Ohio Supreme Court 1894), Coke said that the pregnant woman herself committed a crime if she aborted a quickened fetus. 3 Coke, *Institutes* 50 (1648).

sary for the mother's life or health. The balance struck by Congress was liberal for the mother and restrictive for the unborn, vis-a-vis the usual American legislative standard. The decision below destroys all protection of the unborn, so that even whim can supersede the right to life.

There is nothing unusual, arbitrary or vague in Congress exercising its inherent legislative authority to protect the civil rights of the unborn. The progress of our law in recognition of the fetus as a person has been constant and roughly parallel to the growth of knowledge of biology, embryology, fetology, genetics and perinatology. Judge Gesell's opinion failed to examine the statute from the point of view of the unborn child. Yet the statute must be considered from both points of view: Those of the mother and the child. If Congress had intended to protect *only* the mother, then no *balancing* of rights between those of the unborn and the mother would have been necessary. Congress, from the mother's point of view, would have limited the statute to the requirement of performance by a competent medical man. By limiting even competent medical men to certain conditions (the health or life of the mother) Congress was saying that not all abortions are legal even when performed by competent medical men.

Turning to our law's evolving protection of the rights of the unborn in property, tort, constitutional and equity cases, it will be noted that long before modern biology's certain demonstration of the human qualities of the fetus, the English cases resolved scientific, as well as moral and philosophical, doubts in favor of the unborn.*

* For a review of the development of the English and American criminal law in protection of the unborn, see Louisell and Noonan, *Constitutional Balance,* in *The Morality of Abortion* (Harvard Univ. Press, 1970); Quay, *Justifiable Abortion,* 49 Georgetown L. J. 395, 430 (1961); See also Means, *The Law of New York Concerning Abortion,* 14 New York L. Forum 411, 439 n. 64 (1968).

II.

PROPERTY RIGHTS OF THE UNBORN PERSON ARE PROTECTED BY LAW.

For centuries, the English common law of property has recognized the unborn child as an autonomous human being. It has thus reflected a basic psychological evaluation that in law, as in ordinary thought, "child" includes the conceived but as yet unborn. In *Doe* v. *Clarke*, 2 H. Bl. 399, 126 Eng. Rep. 617 (1795) the court interpreted the ordinary meaning of "children" in a will to include a child in the womb: "An infant en ventre sa mere, who by the course and order of nature is then living, comes clearly within the description of 'children living at the time of his decease.'" In *Thelluson* v. *Woodford*, 4 Ves. 227, 31 Eng. Rep. 117 (1798) Buller, J. rejected the contention that this was a mere rule of construction invoked for the benefit of the child: "Why should not children en ventre sa mere be considered generally as in existence? They are entitled to all the privileges of other persons." (Ibid. at p. 323). To the argument that such a child was a nonentity he replied, at p. 322:

> "Let us see, what this non-entity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the statute of distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian."

When the English property rules were adopted by American courts, the same approach was taken. In *Hall* v. *Hancock*, 15 Pick. 255 (Mass. 1834) the issue was whether a bequest to grandchildren "living at my decease" was valid and the court was asked to say that "in esse" was not the same as "living" and that for a child to be "living" the

mother must be at least "quick." Chief Justice Shaw held that a conceived child fell within the meaning of the language and quoted with approval Lord Hardwicke in *Wallis* v. *Hodson,* 2 Atk. 117: "The principal reason I go upon is, that a child *en ventre sa mere* is a person in *rerum natura,* so that, both by the rules of the civil and common law, he is to all intents and purposes a child, as much as if born in the father's lifetime."

The path of Anglo-American common law has been followed by statute. For example, California Probate Code, Sec. 250 provides that "A posthumous child is considered as living at the death of the parent." Cal. Probate Code, Sec. 255, amended as recently as 1961, provides that an illegitimate child is the heir of his mother, whether the child is "born or conceived."

The approach of the courts is not a Pickwickian one, making what is not in nature something in law. It has not been a sentimental concession to the supposed benefit of some forgotten posthumous child. The rule has been applied even where the application benefited some third party, *Barnett* v. *Pinkston,* 238 Ala. 327, 191 So. 371 (1939) and even where the child himself has been injured by the rule, *In re Sankey's Estate,* 199 Cal. 391, 249 P. 517 (1926) (where a child conceived but not born was held bound by a decree entered against the living heirs).

These property cases established two propositions: First, the ordinary person when he uses "children" in a will means to designate by the term children those who are conceived but not yet out of the womb. This interpretation has, to our knowledge, never been criticized as fanciful or arbitrary or imposed by a court in the service of some theological scheme; it has been generally accepted as a fair interpretation of the ordinary use of language and of

the ordinary person's notion of who are "children." Second, the child in the womb has property rights if there is a will, trust or intestate disposition leaving property to a class of living persons within which he falls.

From these propositions we argue that Congress may properly defend those whom ordinary language designates as "children" and Congress may properly prevent the unregulated extinction of those who may possess property. It would indeed be a strange inversion of values if it were the crime of embezzlement for a parent or guardian to filch an unborn child's income but no crime at all to destroy the recipient of that income.

III.

RIGHTS OF THE UNBORN PERSON ARE NOW PROTECTED BY TORT LAW.

In the area of tort law, a *dramatic change* has occurred in the status of the unborn. Well into the twentieth century most American decisions denied recovery in tort to the human offspring harmed in the womb. The denial was based in part on the danger of fraudulent claims, in part on the difficulty of proving causation, but principally on the ground that "the defendant was not in existence at the time of his action," *Prosser on Torts* (3rd Ed. 1964), Sec. 56. The theory followed was that succinctly expressed by Justice Holmes in *Dietrich* v. *Northhampton,* 138 Mass. 14, at p. 17 (1884): "The unborn child was a part of the mother at the time of the injury."

In *Scott* v. *McPheeters,* 33 Cal. App. 2d 629, 92 P. 2d 678 (1939), petition for rehearing denied, 93 P. 2d 562 (1939) the court held that a child might sue for injury to her in delivery before birth. The Court observed:

> "The respondent asserts that the provisions of Section 29 of the Civil Code are based on a fiction of law

> to the effect that an unborn child is a human being separate and distinct from its mother. We think that assumption of our statute is not a fiction, but upon the contrary that it is an established and recognized fact by science and by everyone of understanding."

The District of Columbia did not lag far behind. *Bonbrest* v. *Kotz*, 65 F. Supp. 138 (D. D. C. 1946). *Since 1946*, the California and District of Columbia approach has become general:

> ". . . [A] series of more than thirty cases, many of them expressly overruling prior holdings, have brought about the most spectacular abrupt reversal of a well-settled rule in the whole history of the law of torts." *Prosser on Torts, supra*, p. 355.

As another writer puts it:

> "The battle in jurisprudence is almost over. The development of the infant's right of action has illustrated the inherent capacity of legal systems to adjust to new situations." Gordon, *The Unborn Plaintiff*, 63 Mich. L. Rev. at 627 (1965).

For a time there was hesitation as to whether recovery must be restricted to a child who was "viable" or, whether alternatively, that at least the mother be "quick" at the time of the injury.* But the majority of courts have imposed no such limitation on the right to recover, *Prosser on*

* At the common law the unquickened fetus was not considered alive. In *4 Blackstone, Commentaries on the Laws of England* (concerning reprieves) 394-95 (1769) it is said: . . . "and if they bring in their verdict "quick with child" (for barely, "with child," unless it be alive in the womb, it not sufficient)." In other words, "with child" was not sufficient to stay execution of a pregnant felon because the fetus was not considered to be alive; whereas "quick with child" was sufficient to stay execution since the fetus was alive and the law would not take the lives of two people where only one had committed the crime. Blackstone also said: "Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb." 1 Blackstone 124 (1769).

Torts, Sec. 56. "Viability" of a fetus is not a constant but depends on the anatomical and functional development of the particular baby, Morison, *Fetal and Neonatal Pathology,* 99-100 (1963). The weight and length of the fetus are better guides than age to the state of fetal development but weight and length vary with the individual, Gruenwald, *Growth of the Human Fetus,* 94 American Journal of Obstetrics and Gynecology, 1112 (1966). Moreover, different racial groups have different ages at which their fetuses are viable. Some evidence, for example, suggests that Negro fetuses mature more quickly than white fetuses, Morison, *Fetal and Neonatal Pathology,* at 101. Viability can also depend on the environment to which the fetus is delivered, as has been demonstrated clinically with animals, Brinster and Thomson, *Development of Eight-Cell Mouse Embryos in Vitro,* 42 Experimental Cell Research 308 (1966). There seems no reason to condition the rights of a fetus on such a shifting and uncertain standard, no reason to draw a line based on age or size within the womb. As Prosser observes at Sec. 56, "Certainly, the infant may be no less injured, and all logic is in favor of ignoring the stage at which it occurs."

As to actions for wrongful death resulting from negligent injuries to the unborn, the situation on a national basis is complicated by the varying provisions of the state wrongful death statutes. One question has been whether an unborn child is a "person" within the meaning of the controlling statute. A majority of courts passing on this question have answered "Yes" even when the child was stillborn. See 15 A. L. R. 3rd 922 (1967). This includes the Third and Fourth Circuits, *Gullborg* v. *Rizzo,* 331 F. 2d 557 (3rd 1964; Penn. Statute); *Todd* v. *Sandidge Construction Co.,* 341 F. 2d 75 (1964; South Carolina Statute).

Ohio's acknowledgement of the humanity of the fetus is explicitly deduced from its constitution. *Williams* v. *Marion*

Rapid Transit, 152 Ohio 114, 87 N. E. 2d 334 (1949); *Stidman* v. *Ashmore,* 109 O. App. 431, 11 Ohio Ops. 2d 383, 167 N. E. 2d 106 (Ohio App. 1959).

The dean of authorities on tort law notes that all writers on the subject have maintained "that the unborn child in the path of an automobile is as much as person in the street as the mother," *Prosser on Torts,* Sec. 56. Can such a child become less a person when, instead of an automobile, another agency is directed to his destruction?

The tort development summarized above is taken as a prime example of the effect of scientific development on law in the instructive book of Edwin W. Patterson of Columbia University Law School entitled *Law in a Scientific Age* (1963). He concludes at p. 35 "that the meaning and scope of even such a basic term as 'legal person' can be modified by reason of changes in scientific facts—the unborn child has been recognized as a legal person, even in the law of torts."

IV.

THE RIGHT OF THE UNBORN PERSON TO LIFE HAS BEEN PROTECTED AND PREFERRED BY LAW OVER CERTAIN CONSTITUTIONAL RIGHTS OF THE PARENTS AND OVER INTERESTS OF THE STATE.

Despite the precedents of property and tort law recognizing the rights of the unborn, it might be argued that the law does not accord this recognition where the interests of the unborn clash with those of his parents. Such modern law, however, as has developed in this unusual area is to the contrary. Where the life of the unborn child is in balance with some lesser interest of the parent, the child has been preferred.

One type of case has arisen through the advances of medicine in the science of fetology. Techniques have been developed since 1963 to make lifesaving transfusions of

who have developed acute anemia in the
blood to fetuses the incompatibility of the fetus' blood with
womb because od. Liley, *Modern Motherhood,* Random
the mother's b 69).
House, p. 48 (1 interest between fetus and parent has
A conflict o the parent by religious conviction has
occurred wher to permit a blood transfusion. In *Raleigh*
believed it sinf *norial Hospital* v. *Anderson,* 42 N. J. 421,
Fitkin-Paul Me 1964) cert. denied 377 U. S. 985, 12 L. ed.
201 A. 2d 537 Ct. 1894 (1964), the mother refused for
2d 1032, 84 S. is to have blood transfusions which had
religious reaso as medically necessary to save her unborn
been diagnosed page 538 the New Jersey Supreme Court
child's life. At
said:

> "We are s tisfied that the unborn child is entitled to
> the law's protection and that an appropriate order
> should be nade to ensure blood transfusions to the
> mother in the event that they are necessary in the
> opinion of he physician in charge at the time."

The life of the unborn child was treated as a value out-
weighing even the sacred constitutional right to freely
exercise one's religion. See also *Hoener* v. *Bertinato,* 67
N. J. Super., 517, 171 A. 2d 140 (1961).

Elsewhere the choice between the interests of the unborn
and the civil rights of the parent have been presented in a
different context. For example, in *Kyne* v. *Kyne,* 38 C. A.
2d 122, 100 P. 2d 806 (1st District 1940), the issue was
whether a father might be compelled to support a fetus
conceived by him. A suit seeking support was begun by
the fetus' guardian ad litem when the fetus was less than
six months old. The court applied California Civil Code,
Section 196a providing that "The father as well as the
mother of an illegitimate child must give him support and
education suitable to his circumstances." The court held

that Section 29 of the Civil Code "must be read together with Section 196a so as to confer the right of an unborn child through a guardian ad litem to compel the right to support conferred by the code." The state has a compelling interest in the welfare of its children whether born or unborn which supersedes even constitutional rights of the parents. *Prince* v. *Massachusetts,* 321 U. S. 158, 166, 64 S. Ct. 438, 88 L. ed. 645 (1944); *State* v. *Perricone,* 37 N. J. 463, 181 A. 2d 751 (1962) *cert. denied* 371 U. S. 890, 83 Sup. Ct. 189, 9 L. ed. 124 (1962); *People ex rel. Wallace* v. *Labrenze,* 411 Ill. 618, 104 N. E. 2d 769 (1952).

Historically, the law has recognized the inviolability of the unborn child by providing for suspension of execution of pregnant women under death sentence, at least when "quick." 1 W. Blackstone, *Commentaries* 456 (W. Jones ed. at 561, 1916); 2 M. Hale, *Pleas of the Crown* 413-14 (1st Am. ed. at 412-13, 1847). This solicitude continues in modern statutes without regard to the state of pregnancy, *e.g.* California Penal Code, Secs. 3705-06 (West 1954).

It would be strange if an unborn child had rights to support from his parents, rights enforceable by a guardian and sanctioned by the criminal law of neglect, rights even paramount to constitutional rights of his parents, and yet have no right to be protected from an abortion. It would be incongruous that an unborn child should be protected by the state from wilful harm by a parent when the injury was inflicted indirectly but not when it was inflicted directly.

In these several ways, then, the law has found a recognizable locus of human rights in the unborn child from conception. It would be hard to pretend that this convergent development of property, tort, welfare and constitutional law was at the dictate of a hidden and impermissible theological impulse. The legislatures, the judges, the commentators have responded to what they found in reality

in the life within the womb. Such sturdy guardians of secular good sense as Justice Buller and Chief Justice Shaw did not invent some imaginary being when they said that the unborn child could have rights of inheritence. Such a perspicacious moulder of the best modern trends in tort as Dean Prosser did not indulge in metaphysical fancy when he found all commentators treating a fetus in the womb on a par with the mother in the path of an automobile.

That the American approach is not some national aberration is testified to by the action taken by the United Nations. In 1959 the United Nations adopted a "Declaration of the Rights of the Child" which supplemented the United Nations' statement entitled the "Universal Declaration of Human Rights." One reason for this supplementary declaration was stated in its Preamble as being because "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth," General Assembly of the United Nations, "Declaration of the Rights of the Child," adopted unanimously in the plenary meeting on November 20, 1959 (*Official Records of the General Assembly*, 14th Session, pp. 19-20). Thus the representatives of most of the nations of the world recognized that the unborn deserved recognition as children and were entitled to legal protection.

If the unborn child can inherit by will and by intestacy, be the beneficiary of a trust, be tortiously injured, be represented by a guardian seeking present support from the parent, be preferred to the religious liberties of the parent, be protected by the criminal statutes on parental neglect, *a fortiori* Congress may guard that unborn child from intentional extinction.

V.

RECOGNIZED RIGHTS OF MARITAL PRIVACY ARE NOT INCONSISTENT WITH THE CONGRESSIONAL PROTECTION OF RIGHTS OF THE UNBORN.

There is an interest of husband and wife to preserve their conjugal relations from state interference, *Griswold* v. *Connecticut*, 381 U. S. 479, 85 Sup. Ct. 1678, 14 L. Ed. 2d 510 (1965). D. C. Code Section 22-201 does not affect the sexual relations of husband and wife. Pregnancy does not interfere with these relations except under some circumstances at limited times; indeed some women are more desirous of intercourse in pregnancy, Guttmacher, *Pregnancy and Birth*, p. 86 (paperback ed. 1960). Control of abortion does not entail state interference with the right of marital intercourse. Nor does enforcement of the statute require invasion of the conjugal bedroom.

Assuming *arguendo*, that there are other marital rights which the state must respect, may it then be urged that one of these rights is the freedom of a married couple not to have, raise and educate a child they do not want? Certainly from the viewpoint of both the parents and the child it is important that the child be wanted. But the parents' attitude toward their offspring cannot be made the single criterion of that offspring's right to continue in existence.

In this area there has been a gradual evolution of civilized thought. In the Roman Republic the father by virtue of the *patria potestas* had the literal power of life or death over his children, Biondi, La Patria Potestas, *Il Diritto Romano Christiano* (1954), Vol. 3, p. 13. "Within the family the paterfamilias enjoyed a lifetime despotism," Budkland and McNair, *Roman Law and Common Law*, p. 35 (1936). In the Roman Empire this freedom to deal with one's chil-

dren as one pleased was limited by the state. Infanticide, however, was still widely practiced and abortion with the consent of the father was legal, Noonan, *Contraception,* Belknap Press of Harvard U. Press, Cambridge, p. 113 (1965). The basic concept of the law was that a fetus was "a part of the woman," Justinian, *Digest* 25.4.1.1. No protection was accorded to this being within the womb, and the law only guarded the father's right to determine this being's destiny.

It was only as the boundaries of the modern Western European nations began to be formed that laws were adopted protecting the fetus. In England, only the "animated or formed" fetus was protected, Bracton, *De legibus et consuetudinibus Angliae* 3.2.4, commentators have construed this to mean quickened. 3 Coke Institutes 50 (1648). It was not until 1803 that English criminal law, following the judicial lead given in the property cases, safeguarded the fetus at all stages of existence by a criminal sanction, 43 Geo. III c. 58. In the nineteenth century the American states followed the English precedent, Bishop, *Commentaries on the Law of Statutory Crimes,* Sec. 746 (2d Ed. 1883). See also Means, *The Law of New York Concerning Abortion,* 14 New York L. Forum 411, 419-422 (1968).*

* Coke said that the pregnant woman herself was guilty of a crime if she aborted a quickened fetus. 3 Coke, *Institutes* 50 (1648). There is much confusion as to whether or not the crime was murder. Coke says it was murder if the child be born alive, and then died. However, if the quickened fetus was stillborn then Coke called it a great misprison. Some commentators translate this as a misdemeanor, but penalties were severe even for a great misprison, *e.g.* loss of a hand and confusion as to the meaning of a great misprison at Coke's time exists. See Holdsworth, *History of English Law,* 389 n. 1 (3d ed. 1923). On the other hand, Hawkins said that abortion in ancient times of a quickened fetus was murder without regard to the distinction made by Coke as to whether or not the fetus must be born alive before it dies. Hawkins, *Pleas of the Crown,* Vol. 1 p. 121 (1788). Hawkins, among others, cited Bracton. The California supreme court recently dealt with this problem (*Keeler* v. *Superior Court of Amador*

Thus over a period of about 2500 years there has been built up a defense by the state in behalf of children, born and unborn, against the aggressive and the proprietary instincts of their progenitors. The problem of the "battered child" today is evidence, if evidence is needed, that the state must still by law restrain the freedom of conduct of parents toward their children, see

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County, Dec. 7853 dec. 6-12-70) and decided that the California legislature meant in 1850 that the fetus must be born alive, live for a short time, and then die before the act which was the cause could be termed murder.

Bracton in the thirteenth century said that abortion of a formed or animated fetus was homicide. Bracton, *The Laws and Customs of England* III, ii, 4, Woodbine ed. 1968 p. 341. Plunkett in *Concise History of the Common Law* at pp. 444-446 says that in Bracton's time if the defenses of misadventure and self-defense were not present, then there was but one case and that was homicide (which explains why Bracton called abortion of an animated fetus homicide). The distinction of degrees of homicide, such as murder and manslaughter, did not occur until well into the fifteenth centry.

Lord Ellenborough's Act, the first English statute on abortion, cured the confusion by making abortion before quickening a felony also but with less penalty. For abortion after quickening the penalty was death; before quickening the penalty was transportation up to fourteen years, whipping, the pillory, imprisonment, etc. 43 Geo. 3, C58 (1803). However, abortion laws are as old as written legal history. See Quay, *Justifiable Abortion* 49 Georgetown Law Review 173 (1961) 395, 399-406. One must not forget that by 1803 whatever co-extensive jurisdiction the ecclesiastical courts of England once held in this area had vanished, but nonetheless Bracton's distinctions between animated and non-animated, which followed Aristotle, have continued to plague our courts under the guise of quickened or non-quickened, and more frequently today viable or unviable.

Such distinctions built on the uncertain meaning of a single paragraph of a thirteenth centry Englishman writing in Latin (Bracton), and misunderstood by a seventeenth century commentator (Coke), cannot do justice to 500 years of early English common law history on this subject. Bracton, Coke, Hawkins, Blackstone, et al., based their legal conclusions on the science of Aristotle, who went medically unchallenged regarding animation until the sixteenth century. This Court should rely on the science of today (see Section VII of this brief) rather than the science of the Fourth Century B. C.

Kempe et al., *The Battered-Child Syndrome,* 181 American Medical Association Journal 17 (1962).

Prior to the seventeenth century the prevailing doctrine had been that of Aristotle that 40 days after conception the fetus underwent a transformation which put him in the human class. This notion was successfully attacked in 1621 as medical nonsense by Paolo Zacchia in his *Quaestiones Medico-Legales* 9.1. Thereafter the medical profession gradually accepted the view that there was no valid line to be drawn within the womb, and the law slowly followed the medical lead.

Today there can scarcely be a return to the Roman law theory that a parent has absolute dominion over his offspring or a return to the ancient notion that a fetus is "part" of his mother. As we show in Point VII, *infra,* the autonomy of the unborn child is established clearly by modern fetology. In the light of this evolution of legal thought and medical knowledge, it would indeed be to turn back the clock to hold that fetal life might be terminated whenever unwanted by the parents.

A fortiori the same considerations apply to the argument that a woman has a right to destroy any fetus of her own that she, in the most literal sense, finds "unbearable." This contention of a right to an abortion vested in a woman has, of course, no constitutional precedent, and it blandly ignores the joint responsibility and interest of a male partner in any conception. Yet this contention may be the emotional heart of the almost hysterical attack upon the abortion statutes.

The claim of freedom over one's body is, of course, a self-evident right, if it means that a woman should be free to refuse sexual intercourse or free to practice contraception. A woman is not under the necessity of subjecting her body to the burden of pregnancy if she chooses either

of these alternatives. But the further claim that a woman is free to destroy the being whom she has conceived by voluntarily having sexual intercourse makes sense only if that being can be regarded as part of herself, a part which she may discard for her own good. *But at this point, the evolution of women's rights encounters the evolution favoring the recognition of the fetus as a living person within the womb,* an evolution supported by the data of science and the precedents of property, torts, constitutional and welfare law.

VI.

THE DISTRICT OF COLUMBIA ABORTION STATUTE IS NOT UNCONSTITUTIONALLY VAGUE.

The opinion below strikes down as unconstitutionally vague D. C. Code 22-201's clause ". . . necessary for the preservation of the mother's life or health . . ." although that has been in the law since 1901, and was re-adopted in 1953. Reliance below on *People* v. *Belous,* 71 Cal. 2d 996, 458 P. 2d 194, 80 Cal. Rep. 354 (1969) rests on a weak reed indeed.

The *Belous* majority, in fact, found the new California standard ("substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother." Cal. Health and Welfare Code 25951(c)(1)) to be a medical standard ". . . and the assessment does not involve considerations beyond medical competence" (458 P. 2d at 205). The substantial similarity between the new California standard and the D. C. standard attacked below indicates that reliance on *Belous* was misplaced.

The statutory language must be so vague that it fails to give warning to the particular defendants charged with crime under the law. "Vagueness" is essentially objec-

tionable because it is unfair. If a given defendant knows perfectly well that what he is doing under the statute is a crime, he may be convicted under it, even though some hypothetical case could be imagined where someone could genuinely be in doubt about the legality of his conduct. *State of Missouri* v. *Mucie,* ..... Mo. ....., 448 S. W. 2d 879, 886 (1970). This reasoning has recently been applied in upholding an abortion statute where it was contended that the statutory exception of "lawful justification" was vague. *State* v. *Moretti,* 52 N. J. 182, 244 A. 2d 499 (1968) *cert. denied* 393 U. S. 952 (1968). In general, it may be said that the persons customarily charged with the crime of abortion—persons operating secretly in out-of-the-way, non-hospital locales—are fully aware that their behavior is condemned by the usual statute. No reputable physician seems to have been prosecuted for performing an abortion in a reputable hospital. Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes, infra,* f.n. p. 749. To the same effect is the case of *Kudish* v. *Board of Registration in Medicine,* ..... Mass. ....., 248 N. E. 2d 264 (1969) where the Supreme Court of Massachusetts held that the word "unlawfully" in the abortion statute was not vague in light of prior decisions by that Court. Both the *Moretti* and *Kudish* cases were decided about the same time as *Belous,* but neither received the wide publicity of that case. It is difficult to believe that what is comprehensible to ordinary men in Massachusetts and New Jersey is not comprehensible to ordinary men in California or the District of Columbia.

VII.

THE UNBORN OFFSPRING OF HUMAN PARENTS IS AN AUTONOMOUS HUMAN BEING.

Stripped to their essentials, attacks such as that below are premised on the unarticulated assumption that the unborn are only "tissue of the mother" and hence disposable at her will.* The historic need of balancing right against right is thus banished from contemplation. Rare indeed are those candid enough to argue that in this modern era, society must have power to direct life-death decisions. Such candor would expose too bluntly the threatening *"Brave New World."* Instead, the argument is couched in such euphemistic verbiage as "terminating pregnancy" or similar sophistry.

But language, however clever, cannot forever conceal meaning. Human life is a continuum,** and if those at one end can be exterminated, why not those at the other? All human life, whether fetal, infant, adolescent, mature or

* See Lucas, Roy, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, North Carolina L. Rev. 46:730 (1967-68), an article marred by an opening sentence which indicates the distortion of fact (Lucas says 10,000 American women a year die from criminal abortions) with which the abortion controversy is being waged in the United States. Even those who opt for completely permissive abortion have agreed (at the Harvard Divinity School International Conference on Abortion) that the maximum number of deaths by illegal abortion in the United States is 250 to 500 per year (250 to 500 per year too many we may add, but one should at least base conclusions upon correct data). See *The Terrible Choice: The Abortion Dilemma*, Bantam Books, at p. 43 (1968).

** "The program of the [Institute of Child Health and Human Development] will give major attention to the study of the continuing process of growth and development that characterize all biological life—from reproduction to prenatal development through infancy and childhood and on into the stages of maturation and aging." Senate Report No. 2174, Institute of Child Health and Human Development (Sept. 27, 1962), Committee on Labor and Public Welfare.

aged, is in the process of becoming. It is our task in the next subsections to show how clearly and conclusively modern science—embryology, fetology, genetics, perinatology, all of biology—establishes the essential humanity of the unborn child. We submit that the data not only shows the constitutionality of the Congressional effort to save the unborn from indiscriminate extermination, *but in fact suggests a duty to do so.* We submit also that no physician who understands this will argue that the law is vague for he will understand that the law calls upon him to exercise his art for the benefit of his two patients: mother and child. As Dr. Liley has said:

> "Another medical fallacy that modern obstetrics discards is the idea that the pregnant woman can be treated as a patient alone. No problem in fetal health or disease can any longer be considered in isolation. At the very least two people are involved, the mother and her child." Liley, H. M. I., *Modern Motherhood,* Random House, Rev. Ed. (1969), p. 207.

A. The Unborn Person Is Also a Patient.*

From conception the child is a complex dynamic rapidly growing organism. By the end of the first month, the child completes the period of relatively greatest size increase and the greatest physical change of a lifetime. The month old child is 10,000 times larger than the fertilized egg and will increase its weight six billion times by birth (1)(4). (See Fig. 1.)

By the end of the seventh week, we see a well proportioned small scale baby. In its seventh week, it bears the familiar external features and all the internal organs of the adult, even though it is less than an inch long and

* In this section and the section which follows, citations are according to medical journal practices. The numbers in parenthesis refer to the correspondingly numbered work in the Bibliography.

weighs only 1/30th of an ounce. The body has become nicely rounded, padded with muscles and covered by a thin skin. The arms are only as long as printed exclamation marks, and have hands with fingers and thumbs. The slower growing legs have recognizable knees, ankles and toes (2)(4). (See Figs. 2 and 3.)

The new body not only exists, it also functions. The brain in configuration is already like the adult brain and sends out impulses that coordinates the function of the other organs. The brain waves have been noted at 43 days (3). The heart beats sturdily. The stomach produces digestive juices. The liver manufactures blood cells and the kidney begins to function by extracting uric acid from the child's blood (4)(40). The muscles of the arms and body can already be set in motion (5).

From this point until adulthood, when full growth is achieved somewhere between 25 and 27 years, the changes in the body will be mainly in dimension and in gradual refinement of the working parts (1)(37).

The development of the child, while very rapid, is also very specific. The genetic pattern set down in the first day of life instructs the development of a specific anatomy. The ears are formed by seven weeks and are specific, and may resemble a family pattern (6). The lines in the hands start to be engraved by eight weeks and remain a distinctive feature of the individual (36)(40). (See Fig. 3.)

The primitive skeletal system has completely developed by the end of six weeks (1)(2). This marks the end of the child's embryonic (from Greek, to swell or teem within) period. From this point, the child will be called a fetus (Latin, young one or offspring) (2). (See Fig. 4.)

In the third month, the child becomes very active. By the end of the month he can kick his legs, turn his feet, curl and fan his toes, make a fist, move his thumb, bend his

wrist, turn his head, squint, frown, open his mouth, press his lips tightly together (5). He can swallow and drinks the amniotic fluid that surrounds him. Thumb sucking is first noted at this age. The first respiratory motions move fluid in and out of his lungs with inhaling and exhaling respiratory movements (4)(5). (See Fig. 8.)

The movement of the child has been recorded at this early stage by placing delicate shock recording devices on the mother's abdomen and direct observations have been made by the famous embryologist, Davenport Hooker, M.D. Over the last thirty years, Dr. Hooker has recorded the movement of the child on film, some as early as six weeks of age. His films show that pre-natal behavior develops in an orderly progression (5)(7)(8).

The pre-requisites for motion are muscles and nerves. In the sixth to seventh weeks, nerves and muscles work together for the first time (1). If the area of the lips, the first to become sensitive to touch, is gently stroked, the child responds by bending the upper body to one side and making a quick backward motion with his arms. This is called a total pattern response because it involves most of the body, rather than a local part. Localized and more appropriate reactions such as swallowing follow in the third month. By the beginning of the ninth week, the baby moves spontaneously without being touched. Sometimes his whole body swings back and forth for a few moments. By eight and a half weeks the eyelids and the palms of the hands become sensitive to touch. If the eyelid is stroked, the child squints. On stroking the palm, the fingers close into a small fist. (7) (5) (4) (55).

In the ninth and tenth weeks, the child's activity leaps ahead. Now if the forehead is touched, he may turn his head away and pucker up his brow and frown. He now has full use of his arms and can bend the elbow and wrist in-

dependently. In the same week, the entire body becomes sensitive to touch. (7) (5) (See Fig. 4.)

The twelfth weeks brings a whole new range of responses. The baby can now move his thumb in opposition to his fingers. He now swallows regularly. He can pull up his upper lip; the initial step in the development of the sucking reflex. (33) By the end of the twelfth week, the quality of muscular response is altered. It is no longer marionette-like or mechanical—the movements are now graceful and fluid, as they are in the new born. The child is active and the reflexes are becoming more vigorous. *All this is before the mother feels any movement.* (33) (55) (See Fig. 5.)

The phenomenon of "quickening" reflects maternal sensitivity and not fetal competence.* Dr. Hooker states that fetal activity occurs at a very early age normally in utero and some women may feel it as early as thirteen weeks. Others feel very little as late as twenty weeks and some are always anxious because they do not perceive movement. (7)

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* If the court is interested in the actual medical history, of nineteenth century legislative opposition to abortion, it may consult the American Medical Association, *1846-1951 Digest of Official Actions* (edited F. J. L. Blasingame 1959), p. 66, where a list of the repeated American Medical Association attacks on abortion are compiled. It will be seen that the great medical battle of the nineteenth century was to persuade legislatures to eliminate the requirement of quickening and to condemn abortion from conception, see Isaac M. Quimby *Introduction to Medical Jurisprudence*, Journal of American Medical Association, August 6, 1887, Vol. 9, p. 164 and H. C. Markham *Foeticide and Its Prevention*, ibid. Dec. 8, 1888, Vol. 11, p. 805. It will be seen that the Association unanimously condemned abortion as the destruction of "human life", American Medical Association, *Minutes of the Annual Meeting 1859*, The American Medical Gazette 1859, Vol. 10, p. 409.

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happened that the air bubble covered the unborn baby's face. The moment the unborn child had air to inhale, his vocal cords became operative and his crying became audible to all present including the physician and technical help. The mother telephoned the doctor later to report that whenever she lay down to sleep, the air bubble got over the unborn baby's face and he was crying so loudly he was keeping both her and her husband awake (33 at p. 50).

The taste buds and salivary glands develop in this month, as do the digestive glands in the stomach. When the baby swallows amniotic fluid, its contents are utilized by the child. The child starts to urinate. (1) (4) (2).

From the twelfth to the sixteenth week, the child grows very rapidly. (41) His weight increases six times, and he grows to eight to ten inches in height. For this incredible growth spurt the child needs oxygen and food. This he receives from his mother through the placental attachment—much like he receives food from her after he is born. His dependence does not end with expulsion into the external environment. (1) (2) (4). We now know that the placenta belongs to the baby not the mother as was long thought. (33) (See Fig. 6).

In the fifth month, the baby gains two inches in height and ten ounces in weight. By the end of the month he will be about one foot tall and will weigh one pound. Fine baby hair begins to grow on his eyebrows and on his head and a fringe of eyelashes appear. Most of the skeleton hardens. The baby's muscles become much stronger, and as the child becomes larger, his mother finally perceives his many activities. (1) The child's mother comes to recognize the movement and can feel the baby's head, arms and legs. She may even perceive a rhythmic jolting movement—fifteen to thirty per minute. This is due to the child hiccoughing. (4) The doctor can now hear the heartbeat with his stethoscope. (1) (4) (See Figs. 8, 9).

The baby sleeps and wakes just as it will after birth. (54) When he sleeps he invariably settles into his favorite position called his "lie." Each baby has a characteristic lie. When he awakens he moves about freely in the bouyant fluid turning from side to side, and frequently head over heel. Sometimes his head will be up and sometimes it will be down. He may sometimes be aroused from sleep by external vibrations. He may wake up from a loud tap on the tub when his mother is taking a bath. A loud concert or the vibrations of a washing machine may also stir him into activity. (4) The child hears and recognizes his mother's voice before birth. (9) (10) Movements of the mother whether locomotive cardiac or respiratory are communicated to the child. (9)

In the sixth month, the baby will grow about two more inches, to become fourteen inches tall. He will also begin to accumulate a little fat under his skin and will increase his weight to a pound and three-quarters. This month the permanent teeth buds come in high in the gums behind the milk teeth. Now his closed eyelids will open and close, and his eyes look up, down and sideways. Dr. Liley of New Zealand feels that the child may perceive light through the abdominal wall. (10) Dr. Still has noted that electro-encephalographic waves have been obtained in forty-three to forty-five day old fetuses, and so conscious experience is possible after this date. (3)

In the sixth month, the child develops a strong muscular grip with his hands. He also starts to breathe regularly and can maintain respiratory response for twenty-four hours if born prematurely. He may even have a slim chance of surviving in an incubator. The youngest children known to survive were between twenty to twenty-five weeks old. (4) The concept of *viability* is not a static one. Dr. Andre Hellegers of Georgetown University states that

10% of children born between twenty weeks and twenty-four weeks gestation will survive (35 A and 35 B). Modern medical intensive therapy has salvaged many children that would have been considered non viable only a few years ago. The concept of an artificial placenta may be a reality in the near future and will push the date of viability back even further and perhaps to the earliest stages of gestation. (34) (39) After 24 to 28 weeks the child's chances of survival are much greater.

Our review has covered the first six months of life. By this time, the individuality of this human being is clear to all unbiased observers. Dr. Arnold Gesell has said:

> "Our own repeated observation of a large group of fetal infants [an individual born and living at any time prior to 40 weeks gestation] left us with no doubt that psychologically they were individuals. Just as no two looked alike, so no two behaved precisely alike. One was impassive when another was alert. Even among the youngest there were discernable differences in vividness, reactivity and responsiveness. These were genuine individual differences, already prophetic of the diversity which distinguishes the human family." (40 at p. 172)

B. The Doctor Treats the Unborn Just as he Does Any Patient.

When one views the present state of medical science, we find that the artificial distinction between born and unborn has vanished. As Dr. Liley says:

> "In assessing fetal health, the doctor now watches changes in maternal function very carefully, for he has learned that it is actually the mother who is a passive carrier, while the fetus is very largely in charge of the pregnancy." (33 at p. 202) (56)

The new specialty of fetology is being replaced by a newer specialty called perinatology which cares for its patients from conception to about one year of extrauterine existence. (47) The Cumulative Index Medicus for 1969 contains over 1400 separate articles in fetology. For the physician, the life process is a continuous one, and observation of the patient must start at the earliest period of life. (See 42 U. S. C. 289(d))

A large number of sophisticated tools have been developed that now allow the physician to observe and measure the child's reactions from as early as ten weeks. At ten weeks it is possible to obtain the electrocardiogram of the unborn child. (12) At this stage also the heart sounds can be detected with new ultrasonic techniques. (45) The heart has already been pumping large volumes of blood to the fast growing child for six weeks. With present day technology, the heart of the child is now monitored during critical periods of the pregnancy by special electronic devices, including radiotelemetry. (13) (51) Computer analysis of the child's ECG has been devised and promises more accurate monitoring and evaluation of fetal distress. (14) A number of abnormal electrocardiographic patterns have been found before birth. These patterns forewarn the physician of trouble after delivery. (48) (49) (53) Analysis of heart sounds through phonocardiography is also being done. (15) (44)

With the new optical equipment, a physician can now look at the amniotic fluid through the cervical canal and predict life-threatening problems that are reflected by a change in the fluid's color and turbidity. (16) (17) In the future, the physician will undoubtedly be able to look directly at the growing child using new fiber optic devices (through a small puncture in the uterus) and thereby diagnose and prescribe specific treatment to heal or prevent illness or deformity. (11) (46)

For the child with severe anemia, the physician now gives blood, using an unusual technique developed by Dr. A. Liley of New Zealand. This life saving measure is carried out by using new image intensifier x-ray equipment. A needle is placed through the abdominal wall of the mother and into the abdominal cavity of the child. For this procedure the child must be sedated (via maternal circulation) and given pain relieving medication, since it experiences pain from the puncture and would move away from the needle if not premedicated. As Dr. H. M. I. Liley states:

> "When doctors first began invading the sanctuary of the womb, they did not know that the unborn baby would react to pain in the same fashion as a child would. But they soon learned that he would. By no means a 'vegetable' as he has so often been pictured, the unborn knows perfectly well when he has been hurt, and he will protest it just as violently as would a baby lying in a crib." (33 at p. 50)

The gastro-intestinal tract of the child is outlined by a contrast media that was previously placed in the amniotic fluid and then swallowed by the child. (43) We know that the child starts to swallow as early as fourteen weeks. (33)

Some children fail to get adequate nutrition when in utero. This problem can be predicted by measuring the amount of estradiol in the urine of the mother and the amount of PSP excreted after it is injected into the child. (19) Recent work indicates that these nutritional problems may be solved by feeding the child more directly by introducing nutrients into the amniotic fluid which the child normally swallows (250 to 700 cc a day). In a sense, we well may be able to offer the child that is starving because of a placental defect a nipple to use before birth. (20)

The amniotic fluid surrounding the unborn child offers the physician a convenient and assessable fluid that he can now test in order to diagnose a long list of diseases, just

as he tests the urine and blood of his adult patients. The doctor observes the color and volume of amniotic fluid and tests it for cellular element enzymes and other chemicals. He can tell the sex of his patient and gets a more precise idea of the exact age of the child from this fluid. He can diagnose conditions such as the adrenogenital syndrome, hemolytic anemia, adrenal insufficiency, congenital hyperanemia and glycogen storage disease. Some of these, and hopefully in the future, all of these can be treated before birth. (21) (22) (23) (24) (25) (26) (27)

At the time of labor, the child's blood can be obtained from scalp veins and the exact chemical balance determined before birth. These determinations have saved many children who would not have been considered in need of therapy had these tests not been done. (28) (29) The fetal EEG has also been monitored during delivery. (52)

A great deal of work has been done to elucidate the endocrinology of the unborn child. Growth hormone is elaborated by the child at seventy-one days and ACTH has been isolated at eleven weeks gestation. (30) The thyroid gland has been shown to function at ten and a half weeks (42), and the adrenal glands also at about this age. (30) The sex hormones—estrogen and andiogen—are also found as early as nine weeks. (30)

Surgical procedures performed on the unborn child are few. However, surgical cannulation of the blood vessels in an extremity of the child has been carried out in order to administer blood. Techniques are now being developed on animals that will be applicable to human problems involving the unborn child. Fetal surgery is now a reality in the animal laboratory, and will soon offer help to unborn patients. (18) (31) (32)

The whole thrust of medicine is in support of the notion that the child in its mother is a distinct individual in need

of the most diligent study and care, and that he is also a patient whom science and medicine treats just as it does any other person. (11) (33)

This review of the current medical status of the unborn serves us several purposes. Firstly, it shows conclusively the humanity of the fetus by showing that human life is a continuum which commences in the womb. There is no magic in birth. The child is as much a child in those several days before birth as he is those several days after. The maturation process, commenced in the womb, continues through the post-natal period, infancy, adolescence, maturity and old age. Dr. Arnold Gesell points out in his famous book that no king ever had any other beginning than have had all of us in our mother's womb. (40) Who among us would assume the awesome power of life and death over these little ones that the trial court below has by its opinion left to the whim—even the sacred sorrows—of the mother?

Secondly, we have proven that quickening is a relative concept which depends upon the sensitivity of the mother, the position of the placenta, and the size of the child. At the common law, the fetus was considered not to be alive before quickening* and therefore we can understand why commentators like Bracton and Coke placed so much emphasis on animation and quickening. But modern science has proven conclusively that any law based upon quickening is based upon shifting sands—a subjective standard even different among races. We now know that life preceeds quickening; that quickening is nothing other than

* See 4 Blackstone, *Commentaries on the Laws of England*, 394-95 (1769) where it is said:

> "In case this plea is made in stay of execution, the judge must direct a jury of twelve matrons or discreet women to inquire the fact, and if they bring in their verdict 'quick with child' (for barely, 'with child,' unless it be alive in the womb, is not sufficient, . . .)."

the mother's first subjective feeling of movement in the womb. Yet the fetus we know has moved before this. In spite of these advances in medicine, some court and legislatures have continued to consider quickening as the point when life is magically infused into the unborn. (See *Babbitz* v. *Mc Cann*, U. S. D. C. Ed. Wis. #69-C-548). No concept could be further from the scientific truth.

Thirdly, we have seen that viability is also a flexible standard which changes with the advance of these new medical disciplines some of which are hardly a half dozen years old. New studies in artificial placentas indicate that viability will become an even more relative concept and children will survive outside of the womb at even earlier ages than the 20-28 weeks in the past. Fetology, and perinatology are only a few years old as specialties. Obstetrics is only sixty years old as a specialty. (33)

Fourthly, we have seen that the unborn child is as much a patient as is the mother. This most important but simple truth is not recognized in the trial court's opinion. In fact, in all the literature one reads opting for permissive abortion, this simple truth is ignored. There are many doctors in this nation who know that the unborn is also their patient and that they must exercise their art for the benefit of both mother and child. How then will they respond to a request for abortion on the most permissive grounds? How will they respond to a demand on the most permissive grounds? What is the next step? Must they respond to a law suit compelling them to perform an abortion? When the physician accepts that he has two patients he will have no difficulty in the exercise of his art for the benefit of child and mother. He will not find the liberal standard (necessary to preserve the life or health of the mother) to be vague because he will take the life of the child only for grave reasons even under this liberal standard.

This standard is not vague because that is the self same standard by which the doctor judges every act of his art. What doctor gives any medical treatment unless necessary to preserve life or health? Then what is the mystery or the vagueness about the standard when applied to preserve the life of the child? Certainly there is nothing vague about dispensing an aspirin for a headache or penicillin for infection. The doctor dispenses them to his patients when it is necessary to preserve their life or health. Then what is so vague about this one area—the most important area—where the action of the doctor means the weighing of one life over another? Every doctor practicing can tell this court when in his medical judgment an abortion is necessary to preserve life or health. There is no medical mystery on that point. A review of the relevant Obstetrics texts will list the indications—psychiatric as well—for therapeutic abortion.* When the doctor makes the decision

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* See Quay, *Justifiable Abortion,* 49 Georgetown Law Journal 173, 1960, pp. 180-241 where the medical reasons for therapeutic abortions as stated in the standard obstetric works from 1903 to 1960 are stated and analyzed.

Dr. Guttmacher has stated:

"On the whole, the over-all frequency of therapeutic abortion is on the decline. This is due to two facts: first, cures have been discovered for a number of conditions which previously could be cured only by termination of pregnancy; and second, there has been a change in medical philosophy. Two decades ago, the accepted attitude of the physician was that, if a pregnant woman were ill, the thing to do would be to rid her of her pregnancy. Today, it is felt that unless the pregnancy itself intensifies the illness, nothing is accomplished by the abortion." (57 at p. 13) See also (58)

Dr. Guttmacher has also said:

"Today it is possible for almost any patient to be brought through pregnancy alive, unless she suffers from a fatal illness such as cancer or lukemia and if so, abortion would be unlikely to prolong, much less save life." (59 at p. 9)

Dr. Guttmacher has also said:

"There is little evidence that pregnancy in itself worsens a psychosis, either intensifying it or rendering prognosis for full recovery less likely." (60 at p. 121)

he must not consider the unborn as "mere tissue of the mother" or he will certainly weigh it no more in the balance than any other replaceable tissue of the mother. Has anyone ever considered the standard vague by which a surgeon removes a cancerous breast? Yet isn't the standard exactly the same? The surgeon removes the cancerous breast to save the life or health of the mother. How much more important is that standard when applied to save the life of the child. Congress spoke and said that under some circumstances, it may be necessary to take the life of the child, but it may not be done unless necessary to preserve the life or health of the mother. The life of the child may not even under this liberal standard be taken except for grave reasons.

CONCLUSION.

This *amicus* is guardian ad litem for the class of all unborn children in Illinois. A holding that Congress is powerless to provide any protection for the unborn children of the District of Columbia would have dire precedential consequences for those this *amicus* represents.

But Congress has the necessary power and has validly exercised it. The judgment below should be reversed.

Respectfully submitted,

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Fig. 1: Age — 40 days

Fig. 2: Age — 6 weeks

Fig. 3: Age — 8-9 weeks

Fig. 4: Age — 10 weeks

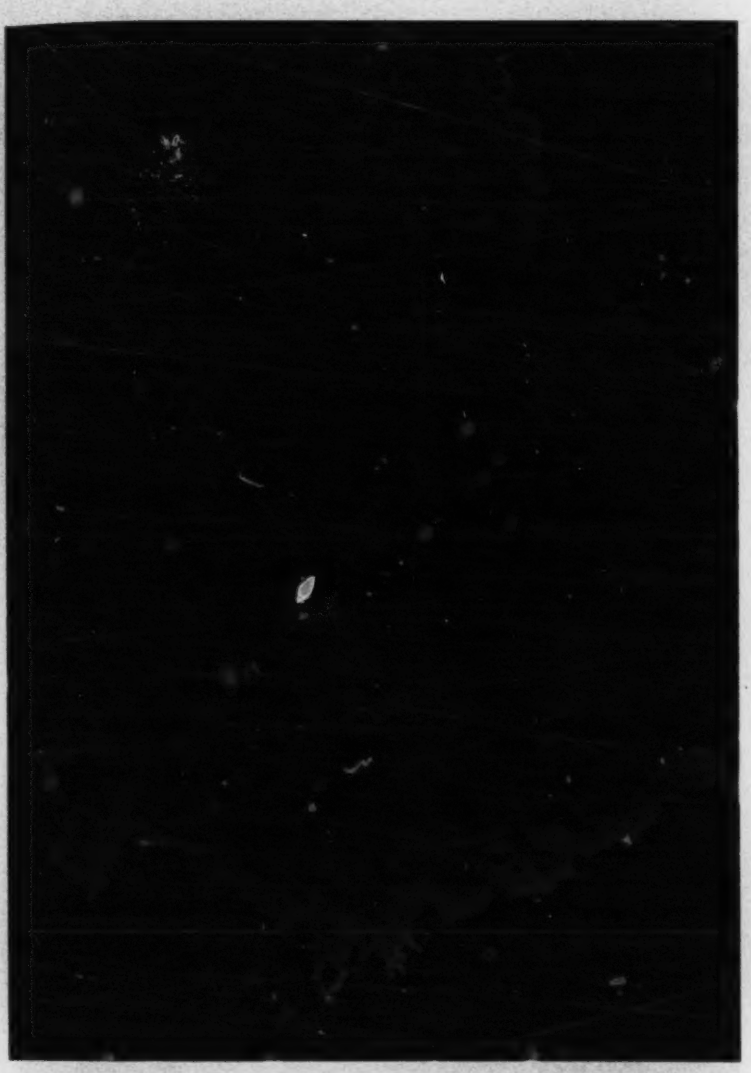


Fig. 5: Age — 11 weeks

Fig. 6: Age — 16 weeks

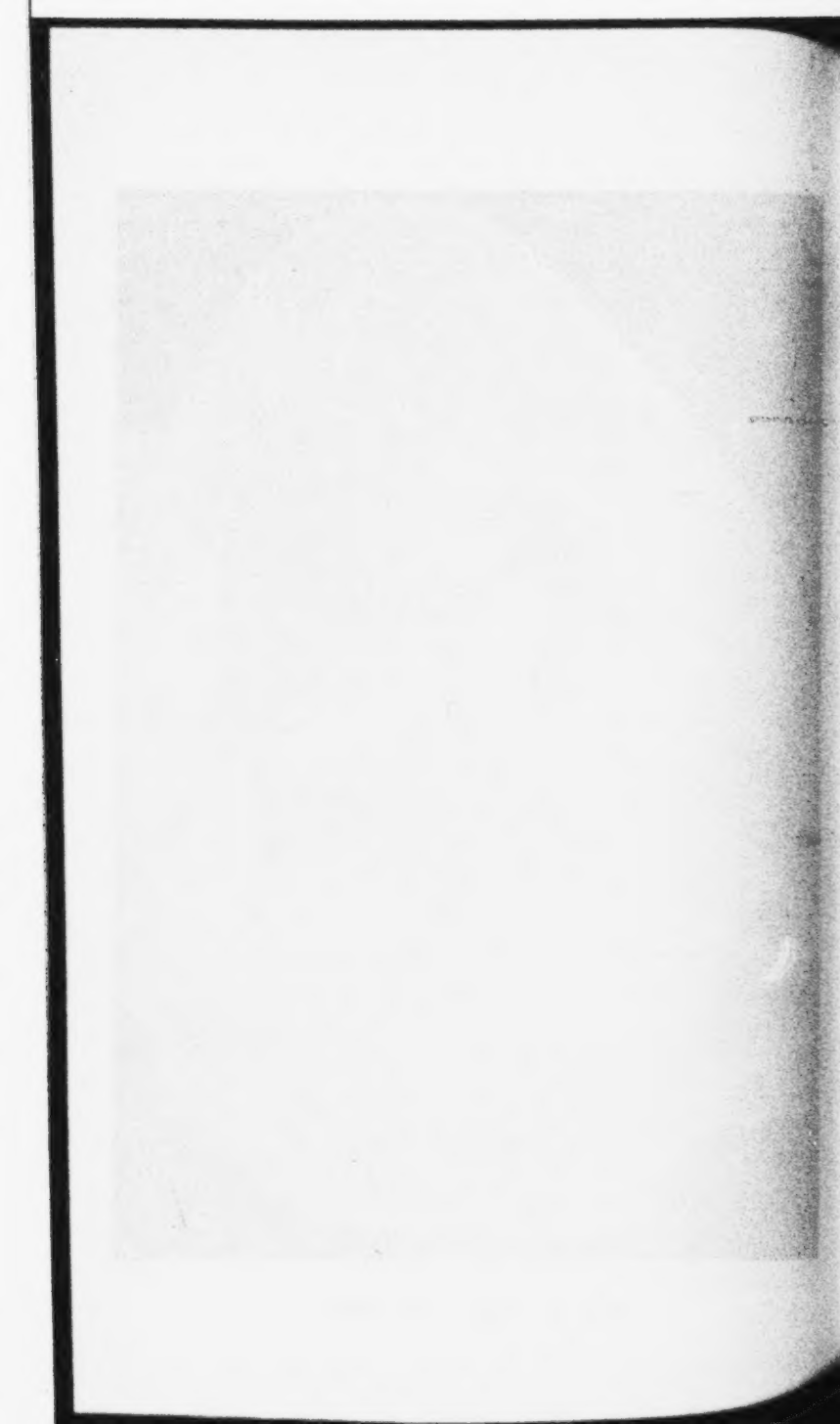


Fig. 7: Age — 17 weeks

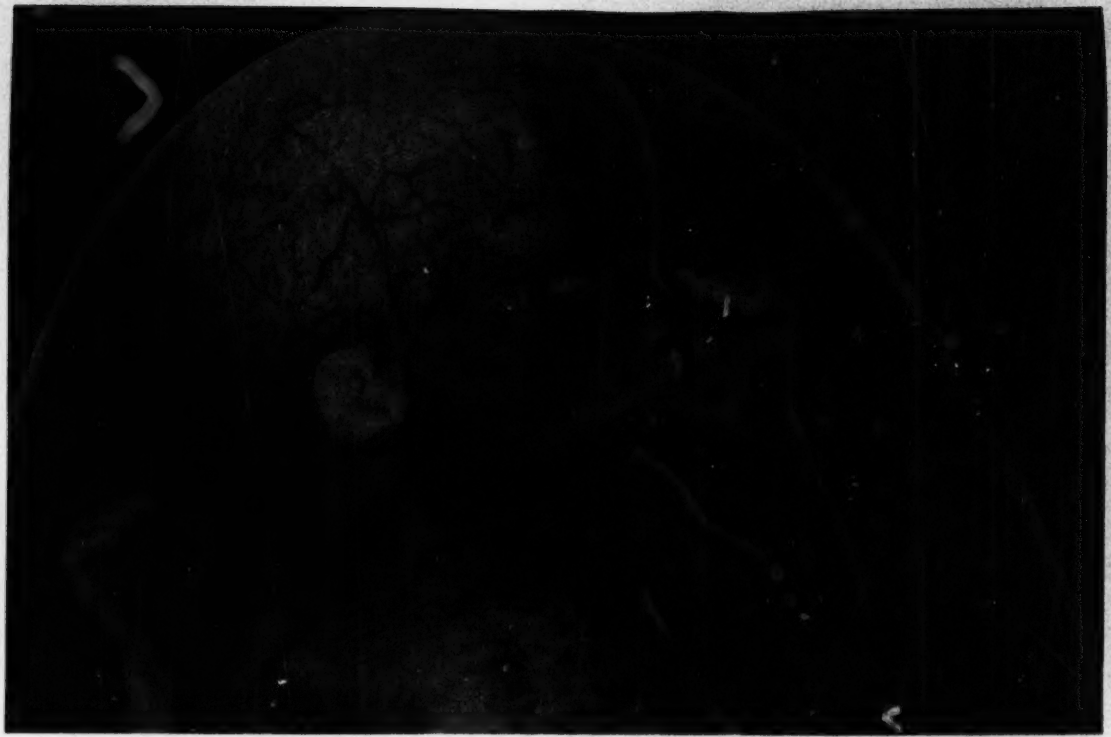
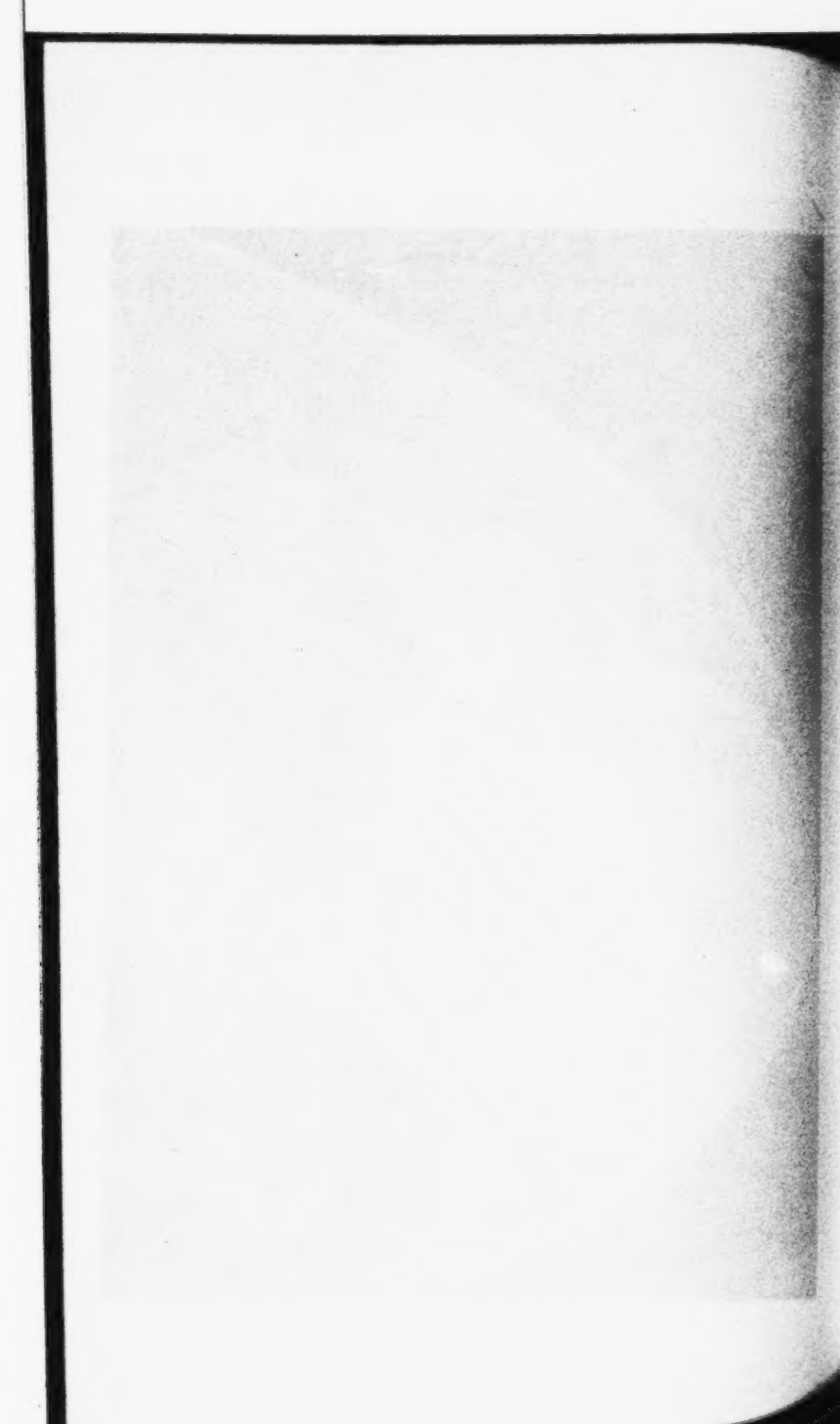


Fig. 8: Age — 18 weeks



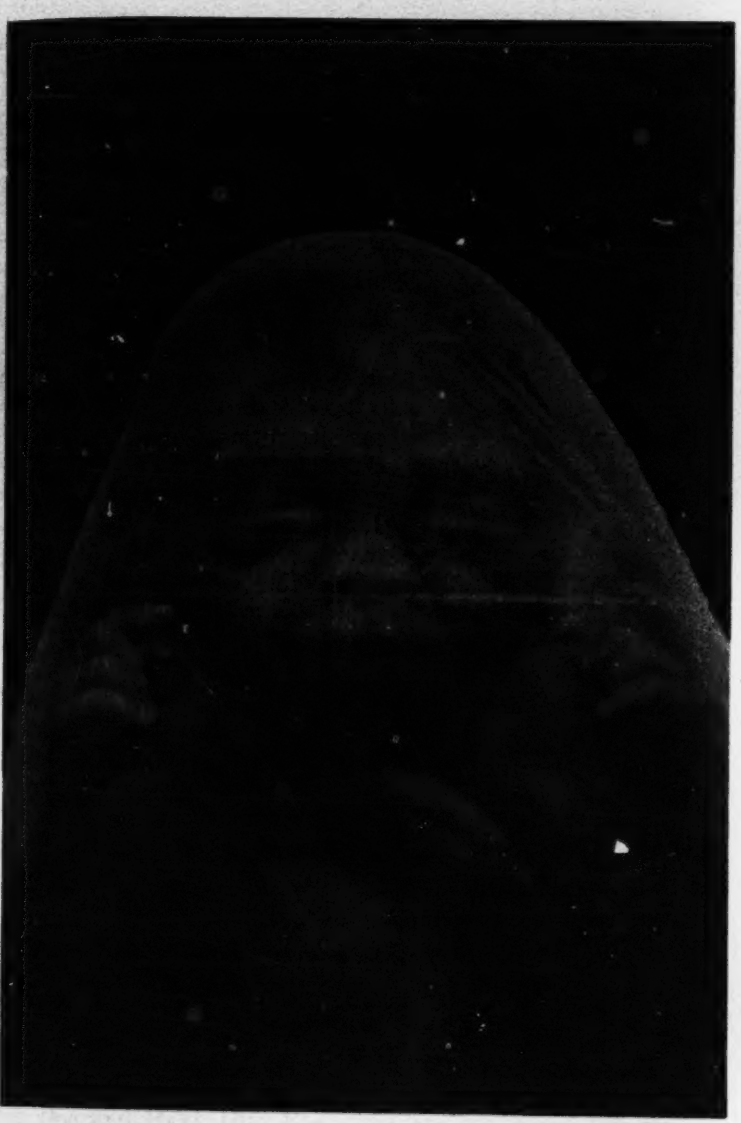


Fig. 9: Age — 28 weeks

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT.
For The Northern District Of Illinois,
Eastern Division.

JANE DOE and SALLY ROE, suing on behalf of themselves and all others similarly situated and DAVID N. DANFORTH, M.D., CHARLES FIELDS, M.D., RALPH M. WYNN, M.D., FREDERICK P. ZUSPAN, M.D., suing on behalf of themselves and all others similarly situated, *Plaintiffs,* *vs.* WILLIAM J. SCOTT, Attorney General of the State of Illinois, and EDWARD V. HANRAHAN, State's Attorney of Cook County, Illinois, *Defendants.*	No. 70 C 395 Jury Demanded.

PETITION OF DR. BART HEFFERNAN TO INTERVENE.

Now comes Dr. Bart Heffernan, who respectfully requests this Court for leave to intervene on behalf of Baby Boy Doe and Baby Girl Roe, who are conceived but unborn, and on behalf of all unborn children who seek, through this intervention, the fundamental right of all

mankind—due process of law for the preservation of human life—and says unto the Court as follows:

1. Plaintiffs have filed a class action seeking a declaratory judgment from a three-judge court that the abortion statutes of the State of Illinois are unconstitutional and void.

2. The plaintiffs describe themselves as representatives of that class of citizens in the State of Illinois, who, because of the abortion statute, must bear unwanted children or seek abortions in foreign nations or states. Plaintiff physicians have described themselves as representing a class of physicians licensed in the State of Illinois and practicing in the area of obstetrics and gynecology.

3. The defendants named are the Attorney General of the State of Illinois and the State's Attorney of Cook County, Illinois, those charged with the duty to uphold the statutes of the State of Illinois in such a declaratory judgment as this.

4. However, there is another class of individuals intimately concerned with the outcome of this suit: children unborn, who, if the abortion law is vitiated, will have no due process of law for the preservation of life, but must depend upon the magniminity and personal convenience of their parents as to whether or not they will in fact exercise the most fundamental civil right of all persons: the right to life as is guaranteed by the United States Constitution, the Constitution of the State of Illinois, the United Nations Charter, the Charter of the World Health Organization and the Universal Declaration of Human Rights of the United Nations, which states:

> "*Article 3*—Everyone has the right to life, liberty and security of person." U. N. General Assembly, 2nd Session, Doc. A/811.

5. Your intervenors are unborn children who will be adversely affected by the abolition of the abortion statute in that their lives may be taken from them without due process of law and without the equal protection of the laws as guaranteed, both by the United States Constitution and the Constitution of the State of Illinois.

6. There is no party presently appearing in this case who adequately represents the class of individuals that your intervenor seeks to represent here. One plaintiff states that she has an unwanted child while the other indicates that she terminated the life of her unborn child for reasons which she does not state in her Complaint. Plaintiff physicians, nowhere in their Petition, mention the rights of the unborn child, but talk only of the rights of the mother and of the stresses of their practice. The defendants, Attorney General and State's Attorney, are charged with statutory obligations to uphold the law and to represent the community as a whole in this action. No party represents the unborn child *per se* and no party presently appearing in this case will present a vigorous case on behalf of the class of unborn children which your intervenor seeks to represent in this litigation.

7. The number of members of this class, which your intervenor seeks to represent in this litigation, is large and joinder of all members is impractical and impossible. There are questions of law and fact which will determine the rights of every member of this class and most importantly, will determine the *right to life* of every member of this class. The claim of the intervenor is the claim of due process under law for the preservation of life and is not only a typical claim of each member of this class, but is the fundamental claim of all human life. Your intervenor will fairly, adequately and aggressively protect the interests of each member of this class and your

petitioner, therefore, requests appointment as Guardian Ad Litem for and on behalf of this class.

8. The class of unborn children will be irreparably injured if intervention is not allowed by this Court since the right to life of each member of the intervening class would be henceforth determined by persons uncontrolled by law and the unborn child would thus be deprived of life without due process or the equal protection of the law, as guaranteed to it by the United States Constitution, the Illinois Constitution and the other expressions of mankind cited previously.

9. Bart Heffernan, M.D. resides at 608 Laurel in Wilmette, Illinois. He is a registered and licensed physician and surgeon in the State of Illinois and is Board Certified in Internal Medicine. He is Director of the Galvin Heart Center at St. Francis Hospital and Chief of the Department of Medicine at St. Francis Hospital in Evanston, Illinois. He is a member of the American Medical Association, the Chicago Medical Society and the Illinois State Medical Society. He is Assistant Clinical Professor, Department of Medicine, Stritch School of Medicine. He is a member of the American Society of Internal Medicine. He is highly qualified and responsible; he will adequately and aggressively represent this class. Baby Boy Doe and Baby Girl Roe are actual existing unborn children.

10. Your intervenor asks leave to file herewith a Motion to Dismiss the Complaint for Declaratory Relief.

11. Your intervenor also requests this Court to grant him leave to file within ten days a Brief in opposition to plaintiffs' Motion to Convene a Three-Judge Court, a Brief in support of intervenor's Motion to Dismiss and a Brief in support of this Petition to Intervene.

WHEREFORE, your intervenor respectfully requests this

Court to enter an Order appointing Dr. Bart Heffernan as Guardian Ad Litem for the class of unborn children described herein and allowing him to intervene in this litigation in behalf of Baby Boy Doe and Baby Girl Roe and on behalf of all unborn children similarly situated and for such other relief as this Court may deem appropriate.

Respectfully submitted.

/s/ Dennis J. Horan,
Dennis J. Horan

/s/ Thomas M. Crisham,
Thomas M. Crisham

/s/ Jerome A. Frazel,
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APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois,
Eastern Division.

JANE DOE and SALLY ROE, *et al.*, *Plaintiffs*,
vs.
WILLIAM J. SCOTT, Attorney General of the State of Illinois, *et al.*, *Defendants.*
No. 70 C 395

ORDER.

This cause coming on to be heard on motion of Dr. Bart Heffernan for the entry of an Order *non pro tunc* as of March 11, 1970 clarifying the Court's Order entered as of said date, the Court having examined the motion, and heard statements of counsel, being fully advised in the premises;

IT IS HEREBY ORDERED that Dr. Bart Heffernan be and is hereby appointed guardian ad litem for the class of all unborn children in the State of Illinois who will be adversely affected by the abolition of the abortion statute in said State, and he is hereby authorized to intervene in this litigation on behalf of Baby Boy Doe and Baby Girl Roe, and on behalf of all unborn children similarly situated, *non pro tunc* as of March 11, 1970.

Entered:

/s/ W. J. CAMPBELL,
Judge.

April 10, 1970.